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Uthayakumar a/l Ponnusamy v Abdul Wahab bin Abdul Kassim (Pengarah Penjara Kajang) & Ors

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COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO W-05–405–08 OF 2018
RHODZARIAH BUJANG, MOHAMAD ZABIDIN AND VAZEER ALAM JJCA
8 NOVEMBER 2019

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Civil Procedure — Contempt of court — Contempt proceedings — Appellant filed motion at High Court to reinstate application for contempt proceeding against respondent — High Court disallowed appellant's application — Appellant appealed against High Court's decision — Whether orders of court formed subject matter of committal proceedings for contempt — Whether Rules of Court 2012 applicable to contempt proceedings — Whether procedural requirements under O 52 mandatory — Rules of Court 2012 O 52

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The appellant filed a motion at the High Court to reinstate his application to reinstate his application to initiate contempt proceedings against the first respondent, which was struck out by the High Court for non-attendance of counsel at case management. The appellant was convicted in the sessions court for an offence under s 4 of the Sedition Act 1948 and sentenced to 30 months

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imprisonment. The appellant appealed against sentence to the High Court but did not apply for bail pending appeal and was serving his sentence at Kajang Prison. The first respondent was the director of Kajang Prison, whilst the second and third respondent were the prison wardens under whose supervision the appellant was held at the material time. In the course of the appeal

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proceedings at the High Court, the appellant had through counsel made several requests to the court which included: (a) the appellant was to be separated from other prisoners at Kajang Prison and placed amongst other political prisoners; (b) the appellant to be referred to Professor Dr Shanmuga Rajah at the Universiti Kebangsaan Malaysia Hospital for medical treatment;

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and (c) the appellant to be permitted to meet with and speak to his lawyer and family members whilst in court or at the court lock-up. The appellant complained that none of the directions or orders of the court were complied with by the respondents and accordingly moved the High Court to cite the respondents for contempt of court. The appellant filed a motion dated 28 April

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2014 at Kuala Lumpur High Court for ex parte leave to initiate contempt proceedings against the respondents for willful disobedience of the court's orders. The High Court granted leave to commence contempt proceedings against the first respondent, but refused leave in respect of the second and third respondents. The appellant appealed the High Court's refusal to grant leave in

respect of the second and third respondents but was dismissed by the Court of Appeal. Following the grant of leave, the appellant filed the substantive motion to commit the first respondent to prison. When the substantive motion was called up for case management before the High Court's judge, the appellant's counsel was absent and the matter was struck out by the learned judge. The appellant applied to reinstate the matter to another judge as the earlier judge was no longer presiding in that court. The learned judge dismissed the appellant's application on the grounds that the reinstatement of the committal proceedings was unsustainable and served no useful purpose. The appellant contended that since the orders alleged to have been breached emanated from criminal proceedings governed by the Criminal Procedure Code, then it would be necessarily followed that the breach of the orders amounted to criminal contempt. It was argued by the learned counsel for the appellant that the Rules of Court 2012 ('the Rules') had no application. The learned senior federal counsel contended that the Rules of Court 2012 were applicable as it was not a criminal contempt but rather civil in nature. It was also contended by the respondent that the appellant had failed to file the statement in support of the leave application as was mandatorily required under O 52 r 3(2) of the Rules.

Held, dismissing the appeal:

(1) It was trite that only orders which were capable of being enforced that might form the subject matter of committal proceedings for contempt of court. An order that was incapable of enforcement could not be said to have been breached with potential penal consequences and was susceptible to punishment for contempt. The ex parte leave to commence committal proceedings against the first respondent ought not to have been granted (see para 16).

(2) There was no merit in the appellant's contention that the application for contempt grounded on the alleged breach of the High Court's directives and orders was criminal contempt, merely because it arose from criminal proceedings. The orders were not made in the course of the criminal proceedings relating to the appeal against sentence and had no bearing to the criminal charge, conviction or appeal at hand. The mere fact that the contempt complained of emanated from a criminal proceeding did not, without more, made it a criminal contempt. Proceedings for contempt were separate and distinct from the proceedings as regarded the main matter before the court, either it was civil or criminal. If the contempt proceedings were initiated by an aggrieved or affected party in breach to enforce the order, then it would with limited exception, was inevitably a civil contempt and the proceedings were civil in nature. Therefore, O 52 of the Rules was applicable (see para 24).

(3) Since the present motion for contempt by the appellant was party initiated, whether it be categorised as a civil or criminal contempt, it was

entirely correct for the learned High Court judge to have held that the procedural requirements under O 52 of the Rules must be strictly adhered to. The fact that the appellant had applied for ex parte leave to commence committal proceedings is in itself an acknowledgement by the appellant that the applicable procedure is that which is stipulated in O 52 of the Rules (see para 26).

(4) The High Court was correct when finding that the fatal flaw in the appellant's application for leave would mean that the very initiation of the process was flawed beyond redemption and the substantive application flowing therefrom was equally beyond repair. There was no evidence of a show cause notice as required under O 52 r 2B of the Rules was issued. The learned judge was correct in finding that the reinstatement of the substantive motion for committal for contempt served no useful purpose because the appellant's prayers were rendered irrelevant as 'the true essence and substance which formed the subject matter of the appeal was ruled as defective and unsustainable'. In agreement with the learned High Court judge, the reinstatement of the matter would an exercise of futility, and that courts do not act in vain (see paras 28–29).

[Bahasa Malaysia summary

Perayu telah memfailkan usul di Mahkamah Tinggi untuk mengembalikan semula permohonannya untuk memulakan prosiding penghinaan terhadap responden pertama, yang telah dibatalkan oleh Mahkamah Tinggi kerana ketidakhadiran peguam di peringkat pengurusan kes. Perayu telah disabitkan bersalah di mahkamah sesyen untuk kesalahan s 4 Akta Hasutan 1948 ('Akta') dan telah dijatuhkan hukuman selama 30 tahun penjara. Perayu merayu terhadap hukuman di peringkat Mahkamah Tinggi namun tidak memohon untuk jaminan semasa rayuan masih berjalan dan sedang menjalani hukuman penjara di Penjara Kajang. Responden pertama merupakan pengarah kepada Penjara Kajang manakala responden kedua dan responden ketiga merupakan warden penjara yang mengawasi perayu pada masa yang material. Semasa proses rayuan dibuat di Mahkamah Tinggi berlangsung, perayu telah membuat beberapa tuntutan melalui peguam kepada mahkamah termasuklah: (a) perayu perlulah dipisahkan daripada banduan-banduan lain di Penjara Kajang dan ditempatkan di antara banduan-banduan politik; (b) perayu perlu dirujuk kepada Profesor Dr Shanmuga Rajah di Hospital Universiti Kebangsaan Malaysia untuk perubatan medikal; dan (c) perayu perlu dibenarkan untuk berjumpa dan berhubung dengan peguam dan ahli-ahli keluarganya semasa di mahkamah atau di lokap mahkamah. Perayu telah mengadu bahawa tiada perintah atau arahan mahkamah telah dipenuhi oleh responden-responden dan selanjutnya telah memindahkan kes ke Mahkamah Tinggi untuk sebutan responden-responden untuk penghinaan mahkamah. Perayu telah memfailkan usul bertarikh 28 April 2014 di Mahkamah Tinggi Kuala Lumpur untuk

kebenaran ex parte untuk memulakan prosiding penghinaan terhadap responden-responden untuk keingkaran arahan mahkamah yang disengajakan. Mahkamah Tinggi memberikan kebenaran untuk memulakan prosiding penghinaan terhadap responden pertama namun tidak membenarkan untuk responden kedua dan responden ketiga. Perayu telah merayu terhadap keputusan Mahkamah Tinggi untuk tidak membenarkan untuk responden kedua dan responden ketiga namun telah ditolak oleh Mahkamah Rayuan. Lanjutan kepada kebenaran diberikan, perayu memfailkan usul substantif untuk membuat komital terhadap responden pertama ke penjara. Semasa usul substantif telah dipanggil untuk pengurusan kes di hadapan hakim Mahkamah Tinggi, peguam perayu telah tidak hadir dan usul telah di dibatalkan oleh hakim tersebut. Perayu telah memohon untuk memasukkan semula usul kepada hakim yang lain disebabkan hakim yang terdahulu tidak lagi berada di mahkamah tersebut. Hakim telah menolak permohonan perayu atas alasan bahawa kemasukan semula untuk prosiding komital adalah tidak boleh dipertahankan dan tidak memberi kesan yang munasabah. Perayu telah berhujah bahawa disebabkan arahan yang didakwa telah dilanggar berpunca daripada prosiding jenayah di bawah Kanun Tatacara Jenayah maka perlu untuk pelanggaran arahan tersebut dikira sebagai penghinaan dari segi jenayah. Peguam perayu telah berhujah bahawa Kaedah-Kaedah Mahkamah 2012 ('Kaedah-Kaedah') tidak boleh digunapakai. Peguam persekutuan telah berhujah bahawa Kaedah-Kaedah adalah terpakai kerana ia adalah bukan penghinaan bersifat jenayah namun bersifat sivil. Reponden juga berhujah bahawa perayu telah gagal untuk memfailkan penyataan sokongan untuk permohonan kebenaran yang merupakan tuntutan wajib dibawah A 52 k 2 Kaedah-Kaedah.

Diputuskan, menolak rayuan tersebut:

(1) Ia adalah kebiasaan bahawa hanya arahan-arahan yang boleh dikuatkuasakan yang boleh dijadikan perkara perbicaraan komital untuk penghinaan mahkamah. Arahan yang tidak boleh dikuatkuasakan tidak boleh dikatakan telah melanggar kesan-kesan kanun dan adalah mempengaruhi terhadap hukuman untuk penghinaan. Kebenaran ex parte untuk memulakan prosiding komital terhadap responden pertama seharusnya tidak boleh dibenarkan (lihat perenggan 16).

(2) Tiada merit dalam hujahan perayu yang menyebut permohonan penghinaan berdasarkan tuduhan pelanggaran arahan-arahan dan perintah-perintah Mahkamah Tinggi adalah penghinaan bersifat jenayah hanyalah kerana ia bermula daripada prosiding jenayah. Perintah-perintah tersebut tidak dibuat semasa prosiding jenayah berkaitan dengan rayuan berkenaan hukuman dan tidak mempunyai kedudukan terhadap tuduhan jenayah, sabitan dan rayuan yang sedang dirayu. Fakta yang hanyalah menunjukkan penghinaan yang diadukan punca daripada prosiding jenayah tidak langsung menjadikan ia sebagai

penghinaan jenayah. Prosiding-prosiding untuk penghinaan adalah terpisah dan berbeza daripada prosiding-prosiding yang dikira sebagai perkara utama di hadapan mahkamah samada jenayah atau sivil. Sekiranya prosiding-prosiding mahkamah telah dimulakan oleh pihak terkesan atau pihak yang terlibat dalam pelanggaran untuk memberi kesan kepada arahan, maka ia adalah pengecualian yang terhad, bahawa ia adalah penghinaan sivil dan prosiding-prosiding adalah bersifat sivil. Oleh itu, A 52 Kaedah-Kaedah adalah digunapakai (lihat perenggan 24).

(3) Oleh kerana usul untuk penghinaan oleh perayu adalah pihak yang memulakan, samada boleh dikategorikan sebagai penghinaan sivil atau jenayah, hakim Mahkamah Tinggi telah membuat keputusan yang tepat dengan menyatakan bahawa syarat-syarat untuk prosedur di bawah A 52 Kaedah-Kaedah perlulah dipatuhi secara ketat. Fakta yang menunjukkan perayu telah memohon untuk kebenaran ex parte untuk memulakan prosiding komital telah menunjukkan perayu mengakui bahawa prosedur di bawah A 52 Kaedah-Kaedah adalah terpakai (lihat perenggan 24).

(4) Mahkamah Tinggi telah membuat keputusan yang tepat apabila mendapati bahawa kecacatan yang serius dalam permohonan perayu untuk kebenaran menunjukkan proses permulaan telah cacat melebihi penebusan dan permohonan substantif seterusnya adalah sama yang tidak boleh dibaiki. Tiada bukti notis tunjuk sebab telah diisukan yang diperlukan di bawah A 52 k 2B Kaedah-Kaedah. Hakim telah membuat keputusan yang tepat dalam penghakiman yang menyatakan memasukkan semua usul substantif untuk komital untuk penghinaan tidak memberikan sebab yang berguna kerana hujahan-hujahan perayu telah dilihat sebagai tidak relevan kepada inti pati sebenar dan bahan yang menghasilkan perkara rayuan yang di taksirkan sebagai defektif dan tidak boleh dipertahankan. Kami bersetuju dengan hakim Mahkamah Tinggi, untuk memasukkan semula perkara tersebut adalah perbuatan yang sia-sia dan mahkamah-mahkamah tidak akan bertindak sia-sia (lihat perenggan 28–29).]

Cases referred to

Ahmad Saidi bin Md Isa v Timbalan Menteri Hal Ehwal & Ors [2006] 3 MLJ 208, CA (refd)

Attorney General & Ors v Arthur Lee Meng Kuang [1987] 1 MLJ 206; [1986] 1 LNS 61, SC (refd)

Bozson v Altrincham Urban District Council [1903] 1 KB 547, CA (refd)

Cheah Cheng Hoc v PP [1986] 1 MLJ 299, SC (refd)

Dr Leela Ratos & Ors v Anthony Ratos s/o Domingos Ratos & Ors [1997] 1 MLJ 704; [1997] 1 CLJ SUPP 115, HC (refd)

Haron bin Mohd Zaid v Central Securities (Holdings) Berhad [1982] 2 MLJ 94, PC (refd)

Metramac Corp Sdn Bhd (formerly known as Syarikat Teratai KG Sdn Bhd) v Fawziah Holdings Sdn Bhd [2006] 4 MLJ 113, FC (refd)
Miller v Miller 652 SE 2d 754, CA (refd)
PCP Construction Sdn Bhd v Leap Modulation Sdn Bhd (Asian International Arbitration Centre, intervener) [2019] 4 MLJ 747; [2019] 6 CLJ 1, FC (refd)
PP v Seeralan [1985] 2 MLJ 30, SC (refd)
Tan Sri Dato' (Dr) Rozali Ismail & Ors v Lim Pang Cheong @ George Lim & Ors [2012] 3 MLJ 458; [2012] 2 CLJ 849, FC (refd)
Uthayakumar a/l Ponnusamy v Abdul Wahab bin Abdul Kassim (Pengarah Penjara Kajang) & Ors [2016] 6 MLJ 670; [2016] 7 CLJ 896, CA (refd)
Zainur Zakaria, Re [1999] 2 MLJ 577; [1999] 3 CLJ 696, HC (refd)

Legislation referred to

Criminal Procedure Code
Rules of Court 2012 O 1 r 2(2), O 42, O 45, O 52, O 52 rr 2A, 2B, 3, 3(2), (3)
Rules of the High Court 1980 O 52
Sedition Act 1948 s 4

Appeal from: Criminal Application Bill 44–27–02 of 2018 (High Court, Kuala Lumpur)

M Manogar (Manogar & Co) for the appellant.
Jamil bin Aripin (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

Vazeer Alam JCA (delivering judgment of the court):

INTRODUCTION

[1] The appellant filed a motion at the High Court to reinstate his application to initiate contempt proceedings against the first respondent, which was earlier struck out by the learned High Court judge for non-attendance of counsel at case management.

[2] Upon hearing the motion to reinstate, the learned High Court judge dismissed it. The appellant appealed that decision vide this appeal. We unanimously dismissed the appeal and affirmed the decision of the High Court.

SALIENT FACTS

[3] The appellant was convicted in the sessions court for an offence under s 4 of the Sedition Act 1948 and sentenced to 30 months imprisonment. The

A appellant appealed against sentence to the High Court. However, he did not apply for bail pending appeal, and at the material time was serving his sentence of imprisonment at Kajang Prison.

B **[4]** The first respondent was the Director of Kajang Prison, whilst the second and third respondents were prison wardens, under whose supervision the appellant was held at the material time.

C **[5]** In the course of the appeal proceedings at the High Court, the appellant had through counsel made several requests to the court, which can be summarised as follows:

(a) that the appellant be separated from the other prisoners at Kajang Prison and be placed amongst other political prisoners;

D (b) that the appellant be referred to one Professor Dr Shanmuga Rajah at the UKM Hospital for medical treatment, as he had previously treated the appellant; and

(c) that the appellant be permitted to meet with and speak to his lawyer and family members whilst in court or at the court lock-up.

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[6] The learned judge had acceded to the appellant's aforementioned request and directed the deputy registrar to convey the court's directive to the respondents.

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[7] In respect of the first two requests, the deputy registrar had on 12 December 2013 written to the officer in charge of Kajang Prison, ie the first respondent, conveying the judge's directive that the first two requests be complied with. The said letter reads as follows:

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Pegawai Yang Menjaga

Penjara Kajang

Kajang, Selangor Tuan/Puan,

Wilayah Persekutuan Rayuan Jenayah Bil: 425-91-07/2013

H

(Mahkamah Sesyen Kuala Lumpur Kes Tangkap No: 14-62-548-2007)

Uthayakumar a/l Ponnusamy Lawan

Pendakwa Raya

I

Dengan hormatnya saya merujuk kepada perkara di atas.

2. Adalah dimaklumkan bahawa kes ini telah ditetapkan untuk Sicara pada 15.1.2014 di hadapan YA Hakim Dato' Mohd Azman bin Husin.

3. Pada tarikh yang lepas, berdasarkan permohonan dari Peguambela Perayu, YA Hakim telah mengarahkan supaya perayu dirujuk ke Hospital Universiti Kebangsaan Malaysia untuk mendapatkan rawatan lanjut bagi penyakit yang dihadapinya.

4. Selanjutnya YA Hakim juga mengarahkan supaya Perayu ini diasingkan dari banduan-banduan lain dan hanya ditempatkan dengan banduan politik sahaja.

5. Kerjasama dan perhatian awal pihak tuan berhubung perkara terse but di atas amatlah dihargai.

Sekian terima kasih.

'BERKHIDMAT UNTUK NEGARA'

Saya yang menurut perintah,

(NOOR AINI BINTI YUSOF)

TIMSALAN PENDAFTAR

SAHAGIAN JENAYAH

MAHKAMAH TINGGI

Kuala Lumpur

(Tel: 03-62094592/4604)

s.k

Timbalan Pendakwa Raya

Jabatan Peguam Negara

Bahagian Perbicaraan dan Rayuan

Aras 5, No 45 Presint 4

Persiaran Perdana

52100 Putrajaya

[8] The second and third respondents were also informed of the court's directive in respect of the appellant's third request to be allowed to see and speak to his lawyer and family members whilst attending court proceedings.

[9] The appellant complained that none the above directions or orders of the court were complied with by the respondents, and accordingly moved the High Court to cite the respondents for contempt of court.

LEAVE TO COMMENCE COMMITTAL PROCEEDINGS

[10] The appellant filed a motion dated 28 April 2014 at the Kuala Lumpur High Court for ex parte leave to initiate contempt proceedings against the respondents for wilful disobedience of the court's orders. The High Court granted leave to commence contempt proceedings against the first respondent, but refused leave in respect of the second and third respondents.

[11] The appellant appealed the High Court's refusal to grant leave in respect of the second and third respondents. There was no cross-appeal by the first respondent. The Court of Appeal dismissed the appellant's appeal against the High Court's refusal to grant leave in respect of the second and third respondents. The decision of the Court of Appeal in that regard is relevant to the present appeal and we shall allude to it shortly.

SUBSTANTIVE MOTION FOR COMMITTAL STRUCK OUT

[12] Now, in respect of the first respondent, following the grant of leave, the appellant filed the substantive motion to commit the first respondent to prison. On 4 August 2017, when the substantive motion was called up for case management before the High Court judge, the appellant's counsel was absent and the matter was struck out by the learned judge. The appellant then applied to reinstate the matter.

APPLICATION TO REINSTATE COMMITTAL PROCEEDINGS

[13] The application to reinstate was heard by another judge, as the earlier judge was no longer presiding in that court. However, the learned judge dismissed the application on grounds that the reinstatement of the committal proceedings was unsustainable and served no useful purpose. The learned judge's decision was primarily based on two decisions of the Court of Appeal, one of which was in relation to the High Court's refusal to grant leave for committal in respect of the second and third respondents. This is what the learned High Court judge said in his judgment:

> [17] I do not disagree with the key contention of the applicant for reinstatement. After all, s 18(1) of the Courts of Judicature Act 1964 provides the following:
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> > Every proceeding in the High Court and all business arising thereout shall, save as provided by any written law, be heard and disposed of before a single judge.
>
> [18] I would agree that reinstatement would not be inappropriate. The matter ought to be allowed to be progressed into its substantive committal stage.
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> [19] But I find the stance taken by the first respondent to be more compelling. In my view, permitting the reinstatement now would not achieve what the applicant seeks, for the matter is already nugatory. A pursuit of the matter is of no further utility. It is entirely spent.
>
> [20] This, in my view, is the inevitable conclusion arising from the first of the two decisions of the Court of Appeal in Uthayakumar a/l Ponnusamy v Abdul Wahab bin Abdul Kassim & 2 Ors (Mahkamah Rayuan Rayuan Jenayah No 09–377–12 Tahun 2014)('CA No 1') and Uthayakumar a/l Ponnusamy v Pengarah Penjara Kajang & 2 Ors (Mahkamah Rayuan Rayuan Jenayah No W-09–288–07 Tahun 2016) ('CA No 2').

[21] It should be stated that the CA No 1 arises from the appeal by the applicant against the decision of the High Court which granted leave to commence committal proceedings only against the first respondent, but not the other two ...

[22] It cannot be denied however, and it is indeed common ground that both appeals in CA No 1 and CA No 2 emanate from the contempt proceedings initiated by the applicant which in turn is predicated on the alleged violation of or non-adherence to what was said to be directions given by the High Court in its letter of 9 December 2013 referred to earlier, which pertained to the need for the applicant to be kept separately from the prisoners and placed with other political prisoners, and that the applicant to be allowed to receive his medical treatment from HUKM. This direction of the High Court is not only the clear origin for the related applications which had been made the subject to the appeals in CA No 1 and CA No 2, but also the very basis of the committal proceedings which are now sought to be reinstated before me.

[23] In CA No 1 the Court of Appeal not only dismissed the appeal against the refusal of the High Court to grant leave against the second and third respondents, but also ruled that the leave granted against the first respondent to be defective. In CA No 2, the Court of Appeal also dismissed the appeal by the applicant.

[14] In CA No 1, the judgment of which is reported in *Uthayakumar a/l Ponnusamy v Abdul Wahab bin Abdul Kassim (Pengarah Penjara Kajang) & Ors* [2016] 6 MLJ 670; [2016] 7 CLJ 896, the Court of Appeal had held that the directives or orders issued by the High Court were neither final or interlocutory in nature. The Court of Appeal in CA No 1 further found that these directives or orders were entirely unrelated to the issue that required the court's determination in that case, ie the appellant's appeal against sentence, and that they were 'mere administrative directions to the respondents to be carried out by the respondents in accordance with rules administered by the respondents at the respondents' discretion and convenience'.

[15] Hence, the Court of Appeal in CA No 1 found that such directives or orders did not fall within the scope of O 42 of the Rules of Court 2012, and were thus, incapable of enforcement under O 45 of the Rules of Court 2012. See the Privy Council's decision in *Haron bin Mohd Zaid v Central Securities (Holdings) Berhad* [1982] 2 MLJ 94 applying the test in the English case of *Bozson v Altrincham Urban District Council* [1903] 1 KB 547 in determining the nature of orders and affirming the judgment of the Federal Court in this regard. That being so, the breach of such directives or orders cannot form the basis of contempt proceedings under O 52 of the Rules of Court 2012.

[16] We are in agreement with those findings. It is trite that only orders which are capable of being enforced that may form the subject matter of committal proceedings for contempt of court. An order that is incapable of enforcement cannot be said to have been breached with potential penal

consequences, and be susceptible to punishment for contempt. Hence, the ex parte leave to commence committal proceedings against the first respondent ought not to have been granted.

[17] The appellant's appeal against the Court of Appeal's decision in CA No 1 was dismissed by the Federal Court and the judgment of the Court of Appeal was affirmed. Thus, we are bound by the Federal Court's affirmation of the same.

SUBMISSIONS OF PARTIES

[18] The appellant contended that both CA No 1 and CA No 2 have to be revisited on grounds that the Court of Appeal in both cases had erroneously applied the Rules of Court 2012 in its determination, when according to the appellant these Rules are not applicable to contempt proceedings emanating from criminal proceedings. In this regard, learned counsel for the appellant has referred to O 1 r 2(2) of the Rules of Court 2012 that states:

> (2) These Rules do not have effect in relation to proceedings in respect of which rules have been or may be made under any written law for the specific purpose of such proceedings or in relation to any criminal proceedings.

The appellant argued that since the orders alleged to have been breached emanate from criminal proceedings, ie a criminal appeal, which is governed by the Criminal Procedure Code, then it would necessarily follow that the breach of such orders would amount to criminal contempt. Learned counsel for the appellant therefore submitted that the Rules of Court 2012, which is applicable only for civil proceedings, has no application. However, the learned senior federal counsel appearing for the first respondent contended otherwise and submitted that by virtue of the Federal Court's affirmation of the Court of Appeal's decision in CA No 1, the learned High Court judge had correctly exercised his discretion in refusing the reinstatement motion. The learned senior federal counsel further argued that the Rules of Court 2012 is applicable to the contempt proceedings initiated by the appellant as it is not a criminal contempt but rather civil in nature.

OUR DECISION

[19] We are unable to accept the appellants contention. It is well established that contempt of court can be classified into two distinct categories, that is, civil or criminal. See the Federal Court's decision in *Tan Sri Dato' (Dr) Rozali Ismail & Ors v Lim Pang Cheong @ George Lim & Ors* [2012] 3 MLJ 458; [2012] 2 CLJ 849.

[20] In *Dr Leela Ratos & Ors v Anthony Ratos s/o Domingos Ratos & Ors* [1997] 1 MLJ 704; [1997] 1 CLJ SUPP 115 the High Court had alluded to

this two categories of contempt in the following terms:

> [3] Contempt of Court may be classified either as (1) criminal contempt consisting of words or acts obstructing or tending to obstruct or interfere with the administration of justice, or (2) contempt in procedure, otherwise known as civil contempt, consisting of disobedience to the judgments, orders or other process of the court, and involving a private injury and criminal contempt is an offence punishable by imprisonment or a fine or by an order to give security for good behaviour.

[21] In *Miller v Miller* 652 SE 2d 754 Court of Appeal 2007, the Court of Appeals of South Carolina had in very clear terms explained the difference in classification between civil and criminal contempt, and it would be apposite to quote the relevant passage from that decision, as it is highly persuasive and relevant to the issue at hand:

> The determination of whether contempt is civil or criminal depends on the underlying purpose of the contempt ruling. In *Floyd v Floyd,* we provided a comprehensive review of the differences between civil and criminal contempt:
>
> > The major factor in determining whether a contempt is civil or criminal is the purpose for which the power is exercised, including the nature of the relief and the purpose for which the sentence is imposed. The purpose of civil contempt is to coerce the defendant to do the thing required by the order for the benefit of the complainant.
> >
> > The primary purposes of criminal contempt are to preserve the court's authority and to punish for disobedience of its orders. If it is for civil contempt the punishment is remedial, and for the benefit of the complainant. But if it is for criminal contempt the sentence is punitive, to vindicate the authority of the court.

Hence, the Court of Appeals of South Carolina had differentiated the two categories of contempt by determining the underlying purpose of the contempt ruling. If the purpose of the contempt ruling is remedial, ie for the benefit of the complainant, then it is civil. And if it is to preserve the court's authority and keep pure the administration of justice, then it is criminal. The basis of this dichotomy is discussed in some depth in an earlier academic article — *Distinction Between Civil and Criminal Contempt — Donner et al v Calvert Distillers Corp, 12 Md L Rev 241 (1951)* (available at: http://digitalcommons.law.umaryland.edu/mlr/vol12/iss3/6).

[22] Thus, generally, in civil contempt, the party complaining of the breach initiates contempt proceedings; whilst in criminal contempt the court of its own motion frames the complaint against the alleged contemnor, or the attorney general, or the party with sufficient interest in the subject matter, moves the court.

[23] In this regard, we find that the learned judge had correctly applied the law to the facts when he made the following findings:

> [40] It is therefore clear that this does not mean that the committal proceedings against the first respondent is a criminal action. A breach of a court order is usually regarded as civil contempt. A criminal contempt is where the public prosecutor initiates the action or where the contempt is in the face of the court, in the sense that the conduct in question interferes with the due administration of justice.
>
> [41] In my view, a major determinant as to whether a contempt is civil or criminal in nature is to ascertain the objective for which the contempt power is exercised. In the case of civil contempt, its exercise is largely to compel the contemnor to perform what is stipulated in the court order, often for the benefit of the applicant. On the other hand, the overriding purpose of criminal contempt is more to uphold and vindicate the authority of the court.
>
> [42] That the action by the applicant is a civil contempt is also obvious from the fact that leave was applied for and granted in respect of the first respondent, and that the applicant is now already in the process of initiating the substantive stage of the committal proceedings. These are the procedural steps mandated by O 52 of the Rules of Court 2012.

[24] Hence, we do not find any merit in the appellant's contention that the application for contempt grounded on the alleged breach of the High Court's directives/orders contained in the letter dated 12 December 2013 is criminal contempt, merely because it arose from criminal proceedings. In fact the orders were not made in the course of the criminal proceedings relating to the appeal against sentence, and has no bearing to the criminal charge, conviction or appeal at hand. We find that it is at best a complaint of civil contempt which is governed by O 52 of the Rules of Court 2012. The mere fact that the contempt complained of emanates from a criminal proceeding does not, without more, make it a criminal contempt. Proceedings for contempt are separate and distinct from the proceedings as regards the main matter before the court, be it civil or criminal. If the contempt proceedings are initiated by an aggrieved or affected party against a party in breach to enforce the order, then, it would with limited exception, be inevitably a civil contempt and the proceedings are civil in nature. Thus, O 52 of the Rules of Court 2012 is applicable. And that is the case here.

[25] In terms of the applicable procedure, contempt proceedings can be divided into three distinct categories, namely:

(a) the court cited — for contempt in the face of the court or scandalising the court, where the procedure is summary in nature. The court taking cognisance of the contempt committed can proceed summarily to deal with the matter: see *Public Prosecutor v Seeralan* [1985] 2 MLJ 30 (SC); *Cheah Cheng Hoc v Public Prosecutor* [1986] 1 MLJ 299 (SC); *Re Zainur Zakaria* [1999] 2 MLJ 577; [1999] 3 CLJ 696. Though this form of

contempt is termed as criminal contempt, the procedure to be followed is not found in the Criminal Procedure Code, for it is not criminal proceeding in the traditional sense. The procedure is in fact spelt out in O 52 r 2A of the Rules of Court 2012, that reads:

> 2A Contempt committed in the face ofthe Court (O 52 r 2A)
>
> (1) If a contempt is committed in the face ofthe Court, it shall not be necessary to serve a formal notice to show cause, but the Court shall ensure that the person alleged to be in contempt understands the nature of the offence alleged against him and has the opportunity to be heard in his own defence, and the Court shall make a proper record of the proceedings.
>
> (2) Where a Judge is satisfied that a contempt has been committed in the face of the Court, the Judge may order the contemnor to appear before him on the same day at the time fixed by the Court for the purpose of purging his contempt.
>
> (3) Where such person has purged his contempt by tendering his unreserved apology to the Court and the Judge considers the contempt to be not of a serious nature, the Judge may excuse such person and no further action shall be taken against him.
>
> (4) Where such person declines or refuses to purge his contempt, then the Judge shall sentence him.

As can be appreciated, the procedure for contempt in the face of the court, when initiated by the court, though summary in nature, is far removed from the summary criminal proceedings under the Criminal Procedure Code.

(b) attorney general initiated — for contempt in the face of the court or for scandalising the court with the aim of protecting the dignity and integrity of the for contempt not committed in the face of the court. The attorney general may do so even where he nor the government were parties to the proceedings. In *Attorney General & Ors v Arthur Lee Meng Kuang* [1987] 1 MLJ 206; [1986] 1 LNS 61 (SC), Mohamed Azmi SCJ said:

> When the contempt is not committed in the face of the court, as is the case alleged here, it is equally important that the dignity and integrity of the court be protected and preserved, and in such cases the contempt proceedings may be initiated by motion either by the Attorney-General or any private party who has sufficient interest in the matter, or even by the court itself, although in practice it seems unjust to expect the court to protect itself by being both complainant and judge, save in the unlikely event of the Attorney-General or the appropriate private party declining to act.

In such instances, how does the attorney general or the appropriate party having sufficient interest in the matter move the court for an order of committal for contempt. It is clear from the pronouncement of the Supreme Court in *Arthur Lee Meng Kuang* that the proper procedure is by way of motion under O 52 of the Rules of the High Court 1980, which is in pari materia with the present O 52 of the Rules of Court 2012.

This was confirmed by the Federal Court in the recent case of *PCP Construction Sdn Bhd v Leap Modulation Sdn Bhd (Asian International Arbitration Centre, intervener)* [2019] 4 MLJ 747; [2019] 6 CLJ 1 (FC), where the attorney general sought an order for committal against a solicitor for contempt of court, more particularly for scandalising the court. The attorney general made the application in accordance with the procedure spelt out in O 52 of the Rules of Court 2012. The Federal Court granted ex parte leave to the attorney general pursuant to O 52 r 3 of the Rules of Court 2012. Following which, the substantive motion for committal was heard by the Federal Court and the proceedings were done in accordance with the requirements under O 52 of the Rules of Court 2012. Though this category of contempt may be termed as criminal contempt, the proceedings were nevertheless done in accordance with O 52 of the Rules of Court 2012. The Federal Court reiterated that:

> [48] Although Parliament has not enacted specific law on contempt of court, the jurisdiction and power to deal with contempt is encapsulated in art 126 of the Federal Constitution, s 13 of the Courts of Judicature Act 1964 ('the CJA') as well as O 52 of the Rules of Court 2012.

(c) party initiated — there are two instances where any party with sufficient interest in the subject matter may initiate contempt proceedings. The first is to seek compliance of any order of court to compel the contemnor to perform what is stipulated in the court order, often for the benefit of the applicant, which would be civil contempt. The second is to uphold and vindicate the authority of the court, when the alleged contemnor's action or inaction interferes with the due administration of justice, which would be criminal contempt. In both cases, the procedure is the same, ie that which is prescribed in O 52, and in particular the followings rules:

> 2B Other cases of contempt (O 52 r 2B)
>
> In all other cases of contempt of Court, a formal notice to show cause why he should not be committed to the prison or fined shall be served personally.
>
> 3 Application to Court (O 52 r 3)
>
> (1) No application to a Court for an order of committal against any person

may be made unless leave to make such an application has been granted in accordance with this rule.

(2) An application for such leave must be made ex parte to the Court by a notice of application supported by a statement setting out the name and description of the applicant, the name, description and address of the person sought to be committed and the grounds on which his committal is sought, and by an affidavit, to be filed before the application is made, verifying the facts relied on.

4 Application for order after leave to apply granted (O 52 r 4)

(1) When leave has been granted under rule 3 to apply for an order of committal, the application for the order must be made by notice of application to the Court, and, unless the Court granting leave has otherwise directed, there must be at least eight clear days between the service of the notice of application and the day named therein for the hearing.

(2) Unless within fourteen days after such leave was granted the notice of application is filed, the leave shall lapse.

(3) Subject to paragraph (4), the notice, accompanied by a copy of the statement and affidavit in support of the application for leave under rule 3 and the order granting such leave, must be served personally on the person sought to be committed.

(4) Without prejudice to the powers of the Court or Judge under Order 62, rule 5, the Court or Judge may dispense with service ofthe notice under this rule if it or he thinks it just to do so.

[26] Having regard to the above, since the present motion for contempt by the appellant was party initiated, whether it be categorised as civil or criminal contempt, it was entirely correct for the learned High Court judge to have held that the procedural requirements under O 52 of the Rules of Court 2012 must be strictly adhered to. This was also the finding of the Court of Appeal in CA No 1, which was subsequently affirmed by the Federal Court. The appellant argued that O 52 of the Rules of Court 2012 has no application to his application for reasons discussed earlier. However, the fact that the appellant had applied for ex parte leave to commence committal proceedings is in itself an acknowledgment by the appellant that the applicable procedure is that which is stipulated in O 52 of the Rules of Court 2012. Further, when queried as to what other procedures were available in law to handle an application for contempt, other than that provided in O 52 of the Rules of Court 2012, learned counsel for the appellant was unable to show us any. Hence, the applicable procedure when the court is moved for contempt by the attorney general or an interested party is that which is found in O 52 of the Rules of Court 2012. The process has to start with a formal show cause notice under O 52 r 2B of the Rules of Court 2012 and continue therefrom.

A THE ABSENCE OF STATEMENT UNDER O 52 r 3(2) OF THE ROC

[27] When applying for leave to commence committal proceedings, the appellant had failed to file the statement in support of the leave application as is mandatorily required under O 52 r 3(2) of the Rules of Court 2012. It has been established by high authority that the failure to file the statement under O 52 r 3(3) of the Rules of Court 2012 is fatal. The Court of Appeal in CA No 1 had alluded to this failure and made the following observation:

> [30] Let us be reminded that under O 52 r 3(2) of the Rules of Court 2012 a leave application for committal must be supported by a statement setting out the name and description of the applicant, the name, description and address of the person sought to be committed and the grounds on which his committal is found, and also by an affidavit verifying the facts stated in the statement. Rule 6(3) of O 52 of the Rules of Court 2012 provides that except with leave of the court hearing an application for an order of committal, no grounds shall be relied upon at the hearing except the grounds set out in the statement supporting the application. Thus, the filing of the statement supporting the application for a committal order must specify with clarity, inter alia, the ground or grounds on which the committal is sought and the facts which formed the basis of the grounds must be verified by an affidavit filed together with the application. In this respect, and upon perusal of the motion filed by the appellant (at pp 24–25 of the appeal record), we could not find any such statement being filed. What we have is only the affidavit in support of the motion.
>
> [31] A careful scrutiny of the notice of motion for leave filed by the applicant shows that it contains only the prayers to commit the respondents for failure to comply with the court's directives, nothing more. The non-filing of the statement is fatal to the appellant's application for leave. The statement is the document that gives the facts particularising the alleged contemnors, the court order that was said to have been breached, the nature ofthe alleged contempt and the grounds on which committal is sought. The defect arising from non-filing of the statement cannot be corrected by affidavit. Firstly, reading O 52 r 3(2), it is mandatory that both statement and affidavit in support of the application must be filed. Secondly, the purpose of the affidavit is to verify the facts stated and particularised in the statement alleging the contempt. Clearly there has been non-compliance with the rules. On this ground alone the leave ought to have been refused.

[28] Thus, the learned High Court judge was entirely correct when he found that this fatal flaw in the appellant's application for leave would mean that the very initiation of the process was flawed beyond redemption, and concomitantly, the substantive application flowing therefrom was equally beyond repair. Further, there was also no evidence of a show cause notice as required under O 52 r 2B being issued. The reinstatement of the matter, if allowed, would merely prolong its inevitable demise. And we see no purpose in the continued utilisation of the court's finite resources in furthering such a lost cause.

[29] Hence, we find that the learned judge was correct in making the finding that the reinstatement of the substantive motion for committal for contempt served no useful purpose because the appellant's prayers for relief have been rendered irrelevant as 'the true essence and substance which formed the subject matter of the appeal has been ruled as defective and unsustainable' and the orders of the High Court contained in the letter of 12 December 2013 was incapable of enforcement based on a finding and ruling that had been affirmed by the Federal Court. In this regard, we are in agreement with the learned High Court judge that the reinstatement of the matter would be an exercise in futility, and that courts do not act in vain (see *Metramac Corp Sdn Bhd (formerly known as Syarikat Teratai KG Sdn Bhd) v Fawziah Holdings Sdn Bhd* [2006] 4 MLJ 113 (FC); *Ahmad Saidi bin Md Isa v Timbalan Menteri Hal Ehwal & Ors* [2006] 3 MLJ 208 (CA).

[30] By reason of the foregoing, we dismissed the appeal.

Appeal dismissed.

Reported by Mohd Kamarul Anwar